OCA 87-3592

OFFICE OF CONGRESSIONAL AFFAIRS

Routing Slip

	ACTION	INFO
1. D/OCA		XX
2. DD/Legislation	XX	[redacted]
3. DD/Senate Affairs		XX
4. Ch/Senate Affairs		
5. DD/House Affairs		XX
6. Ch/House Affairs		
7. Admin Officer		
8. Executive Officer		
9. FOIA Officer		
10. Constituent Inquiries Officer		
11.		
12.		

SUSPENSE 20 Aug 87
Date

Action Officer: [redacted] STAT

Remarks:

ecf 18 Aug 87
Name/Date

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503
August 17, 1987

SPECIAL

O/CONGRESSIONAL AFFAIRS
87-3592

25

LEGISLATIVE REFERRAL MEMORANDUM

TO: **Legislative Liaison Officer -**
Department of State (Howdershell 647-4463)
Central Intelligence Agency
National Security Council
Department of Defense (Brick 697-1305)

SUBJECT: Justice draft report on H.R. 712, private bill for the relief of Larry Lunt. (To be turned into report to the Senate).

NOTE: We will assume your agency has no comment on the subject report if you have not responded within the timeframe.

The Office of Management and Budget requests the views of your agency on the above subject before advising on its relationship to the program of the President, in accordance with OMB Circular A-19.

A response to this request for your views is needed no later than THURSDAY, AUGUST 20, 1987.

Questions should be referred to Annette Rooney/Sue Thau (395-7300), the legislative analyst in this office.

Ronald K. Peterson
RONALD K. PETERSON for
Assistant Director for
Legislative Reference

Enclosures

cc: R. Neely

SPECIAL

U.S. Department of Justice

Office of Legislative and Intergovernmental Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

AUG 13 1987

Honorable James C. Miller III
Director
Office of Management and Budget
Washington, D.C. 20530

Dear Mr. Miller:

This is in response to your request for the views of the Department of Justice with respect to H.R. 712, 100th Congress, a bill "For the relief of Lawrence K. Lunt." The purpose of the private relief bill is to pay $614,185 from general Treasury funds to Mr. Lunt as compensation "for losses he suffered and expenses he incurred in connection with his conviction in Cuba for espionage and his imprisonment there between 1965 and 1979."

We are unaware of the facts of the case except as briefly stated in the House Report, H.R. Rep. No. 100-150, 100th Cong., 2st Sess., which indicated that Mr. Lunt, an American living in Cuba, was allegedly recruited by the Central Intelligence Agency (CIA), placed on its payroll, and engaged in intelligence activities on behalf of the United States from 1960-63. He was convicted of espionage and imprisoned in Cuba from 1965 until 1979, when he was released as a result of a prisoner exchange arranged by the United States. The report states that the $614,185 is to compensate him, as a matter of "equity and justice" for his lost wages and for his medical and legal expenses.

Enactment of this legislation would compensate Mr. Lunt but not other individuals imprisoned by Cuba or other nations for alleged espionage on behalf of the United States. To single out Mr. Lunt for special relief would thus constitute disfavored preferential treatment. That is, it would grant a gratuity to one individual while denying it to those who may be similarly situated. President Reagan withheld his approval of a private relief bill because of the general policy against gratuitous private relief legislation which would establish an undesirable precedent. See 19 Presidential Documents, pp. 9-10. He stated that to single out the three firms who were to be compensated by the bill would be unjust to others similarly situated. Former President Ford vetoed similar preferential legislation twice in 1974. See 10 Presidential Documents, pp. 1386-88.

The Court of Claims also expressed its disapproval of preferential private relief legislation in the course of considering claims pursuant to its "congressional reference" jurisdiction, which permitted Congress to refer private relief bills to that court for an advisory opinion as to whether the claimant had a legal or equitable claim, or whether the proposed compensation from Treasury funds amounted to a disfavored gratuity. For example, in Mackie v. United States, 172 Ct. Cl. 393 (1965), the court advised the Senate that if the proposed beneficiary of the referred private relief bill were given compensation in addition to that which other disabled servicemen were entitled by law:

> He would be given preferential treatment, which is abhorrent to our sense of justice. If Congress chooses to pass a Bill applicable to all members of the Armed Forces whose disability is of a particularly grievous nature, our objection to the present Bill would be removed. Whether such a Bill should be passed is for Congress alone to decide. But the present Bill gives to plaintiff a very large sum to which no other officer totally and permanently disabled is entitled. See Stone v. United States, 160 Ct. Cl. 128, 132 (1963).

172 Ct. Cl. at 398-99. See also Capoeman v. United States, 440 F.2d 1002, 1007-08 (Ct. Cl. 1971). It appears that similar considerations apply in the case of H.R. 712, which would give Mr. Lunt a large sum of money but would not give any compensation to other individuals who have suffered similar or greater losses as a result of their arrest by foreign nations because of their alleged espionage activities on behalf of the United States.

Enactment of H.R. 712 would also run counter to the well-established public policy which forbids the maintenance of a suit, "the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential, and respecting which it will not allow the confidence to be violated. Totten v. United States, 92 U.S. 105, 107 (1876). See United States v. Reynolds, 345 U.S. 1 (1953)." Weinberger v. Catholic Action of Hawaii/Peace Education Project, 454 U.S. 139 (1981). This line of cases was relied upon by the Court of Claims in MacKowski v. United States, 228 Ct. Cl. 717 (1981), in which plaintiff alleged that she was an employee of the CIA hired to perform espionage activities in Cuba. She claimed that her services began in December 1964 and ended when she was released from a Cuban prison in 1977. She alleged that the Government had paid her some of the money owed her but had refused to pay the balance (said to be expenses, related costs, medical bills and other compensation benefits).

The Court of Claims, relying upon the 1875 case of Totten v. United States, 92 U.S. 105 (1875), held in MacKowski that the assertion and defense of a claim for compensation for such secret services could necessarily but impermissibly reveal secret matters which should not be exposed. It rejected plaintiff's claim that the Government had waived a Totten-type defense by the successful efforts of then Senator Frank Church to obtain plaintiff's release from the Cuban prison, reasoning that such action could not be construed as a public confirmation or publication that plaintiff had performed espionage services for the United States. A similar claim was also dismissed in Simrick v. United States, 224 Ct. Cl. 724, 726 (1980), which held that CIA agents could not sue for compensation, but "must look for . . . compensation to the contingent fund of the department employing them, and to such allowances from it as those who dispense that fund may award." Since claims arising out of alleged intelligence activities are not proper for judicial consideration, we suggest that it is also against public policy for Congress to set a precedent for the consideration of similar claims by Congress itself pursuant to the private bill procedure.

There is another reason which leads us to conclude that enactment of H.R. 712 would be contrary to public policy. That is the fact that, according to the bill, Mr. Lunt was released from prison by Cuba in 1979, over seven years ago. The proposed legislation would have the effect of waiving the statute of limitations generally applicable to monetary claims against the Government. We generally oppose the preferential waiving of the statutory bar against the assertion of stale claims. Whether Mr. Lunt has some sort of legal claim to compensation during his incarceration or only an equitable claim upon the conscience of the nation, the passage of time has now barred their assertion.

The statute of limitations applicable to the judicial enforcement of money claims against the Government are 28 U.S.C. § 2501 (Claims Court) and 28 U.S.C. § 2401(a) (district courts). They provide that any claim not filed within six years after it accrues shall be barred. Where the claimant is, like Mr. Lunt, "under legal disability or beyond the seas at the time the claim accrues," both statutes allow only three years after the disability ceases to bring an action. In the case of Mr. Lunt, therefore, any legal claim for compensation was barred in 1982, three years after his release and return to the United States.

Moreover, in the case of claims of an equitable (but not legal) nature, Congress has provided a remedial scheme in the Meritorious Claims Act of 1928, 45 Stat. 413, 31 U.S.C. § 3702. That statute also requires that claims be timely presented. Section 3702(d) provides:

> (d) The Comptroller General shall report to Congress on a claim against the Government that is timely presented under this section that may not be adjusted by using an existing appropriation, and that the Comptroller General believes Congress should consider for legal or equitable reasons. The report shall include recommendations of the Comptroller General.

Emphasis added. Subsection 3702(a) provides that:

> (b)(1) . . . The claim must be received by the Comptroller General within 6 years after the claims accrues . . . .

Emphasis added. The Comptroller General has ruled that this statute of limitations is to be strictly construed against claimants, and that tolling provisions are not to be implied. 64 Comp. Gen. 155 (1984). He has also held that it bars him from submitting a recommendation to Congress that it enact private relief legislation when the claim is barred by limitations, even though he believes the claim should be considered favorably by Congress for equitable reasons. Matter of Sentinel Electronics, Inc., B-208290, September 7, 1982, 82-2 CPD 200. Accordingly, private relief legislation with respect to time-barred claims is disfavored by Congress.

For the foregoing reasons, the Department of Justice recommends against enactment of this legislation.

Sincerely,

John R. Bolton
Assistant Attorney General